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5  
6 IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA

7 CAROLYN MITCHELL, )  
8 Plaintiff, )  
9 vs. )  
10 ANCHORAGE POLICE DEPARTMENT and the )  
11 MUNICIPALITY OF ANCHORAGE, a )  
12 municipal corporation, WALTER MONEGAN, )  
13 Officer HENIKMAN, and Officer J. VOSS, )  
Defendants. )

14 Case No. 3:05-cv-00273-JWS

15 **PLAINTIFF'S OFFICIAL IMMUNITY BRIEFING**

16 At the June 25, 2008, pre-trial conference, the court permitted Plaintiff to  
17 respond to Defendants' request for a jury instruction concerning Official Immunity.  
18 Defendant mistakenly believes that the jury should be instructed on the complex  
19 issue of official immunity, and discretionary immunity. Clearly the question  
20 concerning whether a municipal official is enacting a discretionary function  
21 concerning actions relevant to a tort are legal determinations that only this court can  
22 make, and at this stage of the litigation, can only make if a directed verdict is  
23 presented after the plaintiff has presented her case.  
24

25 As a strictly legal argument, the Defendants have cited to no case law  
26  
27

1 wherein a municipal actor's tort of false arrest can be construed as a discretionary  
2 function. Unlike the immunity afforded state actors under AS 09.50.250, municipal  
3 officers are not permitted the "good faith" defense as laid out in section 1 of that  
4 statute: 'an action may not be brought if the claim (1) is an action for tort, and is  
5 based upon an act or omission of an employee of the state, exercising due care, in the  
6 execution of a statute or regulation, whether or not the statute or regulation is valid.'  
7 Under the municipal immunity clause, AS 09.65.070(d)(2), immunity is premised on  
8 the performance of a "discretionary function." Complying with State statutes is not a  
9 discretionary function.  
10

11  
12 In this case, Voss and Henikman violated Alaska law by (1) arresting  
13 Mitchell, (2) without probable cause. The associated torts of defamation and  
14 intentional infliction of emotional distress are all by products of unlawful conduct. It  
15 is ridiculous to argue, as the Defendants do, that the natural result of unlawful  
16 conduct can be classified as a discretionary act. No municipal official has the  
17 discretion to violate the law.  
18

19 That being said, no case cited by the Defendants establish that the question of  
20 immunity is a jury question. The Defendants could not find an Alaska Pattern Civil  
21 Jury Instruction of official immunity because such questions are legal questions to be  
22 answered by the court. All the cases cited by Defendants are cases that had been  
23 decided at the summary judgment level. As this court has already ruled that qualified  
24 immunity is not an issue for the jury, it is unfounded for Defendants to expect  
25 immunity under state law to become an issue for the jury.  
26  
27

1 Parsing out the legal elements for qualified immunity is a matter for oral  
2 arguments, or written submissions to the court based on the established or undisputed  
3 facts of the case. The jury is not capable of rendering legal conclusions, or assessing  
4 between competing legal theories.  
5

6 Respectfully submitted this 27<sup>th</sup> day of June 2008.

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14 Certificate of Service

15 I hereby certify that on June 27, 2008  
16 I electronically filed the foregoing with  
17 the Clerk of Court using the CM/ECF  
18 system which sent notification to the  
19 following:

20 James Reeves; and Elizabeth Friedman

21 and I hereby certify that I have mailed by  
22 United States Postal Service the document  
23 to the following non CM/ECF participants:

24 none.

25 Dated this 27<sup>th</sup> day of June 2008, at Anchorage, Alaska.

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